

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

ALBERTSON'S, LLC¹

Employer

and

Case 28-RC-6460

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL UNION NO. 1564¹**

Petitioner

DECISION AND DIRECTION OF ELECTION

United Food and Commercial Workers Union, Local Union No. 1564 (Petitioner), seeks an election in a voting group comprised of coffee bar employees who prepare and serve coffee drinks at a single Starbucks kiosk located inside Albertson's Santa Fe, New Mexico grocery store. The Petitioner currently represents the retail grocery store clerks (clerks unit) at the store, and proposes that the election among the coffee bar employees should be a selfdetermination election pursuant to *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937), and *Armour & Company*, 40 NLRB 1333 (1942), because they share a community of interest with the clerks unit. Contrary to the Petitioner, Albertson's, LLC (Employer) urges that the coffee bar employees lack a community of interest with the employees in the clerks unit and that the only appropriate unit is a separate unit of coffee bar employees. Contrary to the Petitioner, the Employer also contends that the coffee bar manager is a supervisor within the meaning of Section 2(11) of the Act and should be excluded from the unit found appropriate. Based upon the reasons more fully set forth below, I find appropriate a selfdetermination election among the coffee bar employees who constitute a homogeneous group and who share a sufficient enough community of interest with the employees in the clerks unit to offer them the option to join the clerks unit, choose to be represented in a stand-alone unit, or choose to remain unrepresented. See *Globe Machine, Armour & Company*, above, and *Warner-Lambert Company*, 298 NLRB 993, 995 (1990). I further conclude that the coffee bar manager is a statutory supervisor based upon her ability to responsibly assign and direct work and to issue verbal discipline, and thus should be excluded from the voting group found appropriate.

¹ The name of the Employer appears as corrected at the hearing. ¹ The name of the Petitioner appears as corrected at the hearing.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. Hearing and Procedures: The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. Jurisdiction: At the hearing, the parties stipulated, and I find, that the Employer, Albertson's, LLC, is a Delaware limited liability company with a retail store in Santa Fe, New Mexico, and other retail stores in other locations in the State of New Mexico, where it is engaged in the retail sales of groceries and related products. During the 12-month period ending June 22, 2006, it had gross revenue in excess of \$500,000 and during the same period it purchased and received at its Santa Fe, New Mexico store goods valued in excess of \$50,000 directly from suppliers located outside the State of New Mexico. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and, therefore, the Board's asserting jurisdiction in this matter will accomplish the purposes of the Act.

3. Labor Organization Status and Claim of Representation: The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. Statutory Question: As more fully set forth below, a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Unit Finding: The issues presented in this matter are: a) whether the petitioned for coffee bar employees share a community of interest with the existing clerks unit; b) whether the coffee bar employees constitute a homogeneous voting group and are entitled to a self-determination election, including the option of voting for inclusion in the clerks unit at the Employer's Santa Fe store; and c) whether the coffee bar manager is properly included in the voting group or should be excluded as a supervisor within the meaning of Section 2(11) of the Act.

For reasons discussed below, I find that the voting group sought by the Petitioner, consisting of the coffee bar employees, but excluding the coffee bar manager, shares a sufficient community of interest with the employees in the clerks unit and a homogeneity of interest with one another such that the coffee bar employees should be provided with the opportunity to vote for inclusion in the existing clerks unit, for a stand-alone unit, or for no representation. I further find that the coffee bar manager is a statutory supervisor who responsibly directs the work of the coffee bar employees and orally disciplines them, and thus should be excluded from the voting group. To provide a context for my decision, I will provide an overview of the Employer's operations, followed by a description of the positions in dispute, and their respective working conditions. I will then present the case law and the reasoning that support my conclusions on these issues.

A. The Employers Operations and Organizational Structure

1. Overview of the Employer's Relevant New Mexico Operations

The Employer operates a chain of retail grocery stores. It maintains three stores in Santa Fe, New Mexico, including the facility which is the subject of the petition, and which is located at 600 North Guadalupe Street (Guadalupe facility), and the St. Francis facility. The Employer also maintains a facility in Roswell, New Mexico (Roswell facility). I take administrative notice of the fact that Santa Fe and Roswell, New Mexico, are approximately 210 miles apart. All of these facilities contain a Starbucks coffee bar kiosk. The record reflects that the Starbucks coffee bars at the Employer's Guadalupe and Roswell facilities were introduced during separate store relocation and remodeling projects a number of years ago.

2. The Guadalupe Facility

The Employer employs approximately 130 individuals at the Guadalupe facility. All but about approximately 14 are represented by two labor unions in three bargaining units with three distinct collective-bargaining agreements. A bakers union represents a unit of production employees directly engaged in baking and decorating products, and the Petitioner represents separate meat department and the clerks units. The clerks unit recognition language, corrected below to reflect the current address of the Employer (the Employer moved locations during the term of the existing contract) is as follows:

The Employer recognizes the Union as the exclusive collectivebargaining representative for all checking, stocking, receiving, produce, bakery sales, and courtesy clerks employed in its supermarket located at [600 North Guadalupe Street] but excluding meat department employees, bakery production employees, janitors, office clerical employees, a scan coordinator, confidential employees, guards, watchmen, professional employees, store director, two assistant store directors, general merchandise manager, and other supervisors, as defined in the Act, and all other employees.

The 14 unrepresented individuals at the Guadalupe facility include the coffee bar employees, the coffee department manager, the grocery manager, the bakery manager, the drug manager, four pharmacists, the personnel coordinator/bookkeeper, and the scan coordinator. No other labor organization has expressed an interest in representing the coffee bar employees.

The Guadalupe store director is Wayne Antonson. Antonson has been employed by the Employer for 23 years and became store director at the Guadalupe facility in February 2005. This is his first experience with an Albertson's that includes a coffee bar. In his capacity as store director, Antonson is responsible for running the store, including the total

sales and profits of the store, and for assuring compliance with government rules and regulations and with the Employer's policies. Antonson does not have the authority to fire employees. A change in corporate policy implemented sometime in the last several years apparently removed such decision making to a centralized level outside of the store. Antonson has the authority to hire, promote, and issue written discipline to employees. The parties stipulated, and I find based on the record, that Antonson is a supervisor within the meaning of Section 2(11) of the Act. Reporting to Antonson are seven department managers: lobby, meat department, service deli, grocery, bakery, general merchandise, and coffee bar. If Antonson is absent from the facility, the grocery manager typically serves in his stead. Reporting to the department managers are the various department employees.

Antonson's Guadalupe store is a 67,000 square foot facility with two double entrance doors. Ninety percent of customers enter through the doors at the left side of the store, which is the entrance closest to the coffee bar. The coffee bar is located approximately 50 feet inside the store. The coffee bar has at least one wall, and against that wall, on the other side, are the service cases for the meat and produce departments. The coffee bar is established and maintained in adherence with Starbucks' standards and design requirements, referred to as the Starbucks' "footprint." The lay out of the Starbucks' footprint, and all of the equipment found therein are specified by Starbucks. The coffee bar has a sign that says "Starbucks Coffee." The coffee bar exists within the Guadalupe facility pursuant to a licensing agreement between Starbucks and the Employer. If these provisions are not adhered to, the license may be revoked. The Guadalupe facility is open daily from 6:00 a.m. to midnight and the coffee bar is open daily from 6:00 a.m. through 7:00 p.m.

B. Functional Integration Between Albertson's and the Coffee Bar

Starbucks products marketed in the coffee bar, with the exception of prepared coffee beverages, may be purchased at any cash register in the store. The Starbucks' products include CDs, bags of coffee beans, Valentine's pillows, and similar items. Albertson's products are not marketed inside the coffee bar, but any Albertson's product may be purchased at the coffee bar cash register. The coffee bar employees must learn a different set of "PLU" cash register codes for the beverages prepared in the coffee bar. Furthermore, the coffee bar is the only part of the store in which a product is prepared, given to, and paid for by a customer, and the only place in the store where coffee is brewed. Albertson's gift certificates may be applied for purchases at the coffee bar register, and Albertson's customers who present their Albertson's card at the coffee bar will receive benefits for their coffee bar purchases. All cash registers in the store are connected to a common system from which sales reports regarding all departments can be produced. The scan coordinator's team is responsible for maintaining retail price integrity, placing the correct price tags on the shelves, and entering Albertson's and Starbucks' products into a data base so they can be scanned at the registers.

In addition to the common system of cash registers, various other functions related to the operation of the grocery store and the coffee bar are integrated. The Guadalupe facility employs a receiving person who receives both the Albertson's and the coffee bar supplies.

When a pallet containing supplies for the coffee bar arrives in the receiving area, the receiving person inspects the pallet for damage, and if there are concerns, he contacts the coffee bar manager. Otherwise, he signs for the pallet and the coffee bar manager or a coffee bar employee goes to the receiving area, breaks down the pallet, and brings its contents to the coffee bar. Maintenance of the coffee brewer and the espresso machine located in the coffee bar must be performed by Starbucks or its designated vendors, but the sinks and the refrigerator in the coffee bar are maintained by Albertson's. In order to contact the coffee bar, it is necessary to call the main telephone number for the Guadalupe facility and request the coffee bar. The coffee bar manager and its employees have access to a Starbucks' voice mailbox through an "800" telephone number. Approximately once per week Starbucks leaves a voice mail for the coffee bar staff indicating new promotions being offered, coffees being promoted, and information regarding any new products. On occasion a customer will purchase a Starbucks drink and then continue in to the Employer's store to shop. At other times customers come in to Starbucks merely to purchase a drink. Any Starbucks' promotions are separate and apart from Albertson's promotions.

C. The Coffee Bar Personnel

1. Coffee Bar Employees (Baristas)

Coffee bar employees are referred to in Starbucks' parlance as baristas. Baristas make coffee, operate the coffee bar cash register, stock supplies, and generally take care of coffee bar customers. Their tools include a simple brewer and an espresso machine. There are four baristas at the Guadalupe facility, and this staffing level has been stable over the last three years. The highest paid of the baristas earns \$10.75 per hour. The city minimum wage in Santa Fe is \$9.50 per hour. The baristas report to the coffee bar manager, Erica Sandoval. The record shows that the baristas view Sandoval as their boss and as the management representative in the coffee bar.

Starbucks' staffing policy requires the presence of two baristas in the kiosk at all times and the presence of at least one certified trainer. As tasks arise, available employees perform the work of the coffee bar such as assisting customers and putting supplies away. It is undisputed that the baristas are employees of Albertson's and that the baristas are selected for employment and assigned to work in the coffee bar by the Albertson's store director. All Albertson's employees, including those employed to work in the coffee bar, must participate in the Albertson's orientation, which lasts between approximately one-half to one full day. The record does not describe the contents of that orientation. Coffee bar employees participate in an additional, 40-hour period of instore training which includes training with regard to brewing coffee, dispensing syrups, properly marking drink cups, and training for a full day on the Albertson's cash register system. As a result of the 40-hour training, baristas are certified to prepare and serve approximately 100 unique Starbucks beverages. Under Starbucks' policy baristas are to obtain their training from certified trainers. Managers are required to obtain trainer certifications. Any barista may also become a certified trainer. In practice, employees train one another regardless of whether they possess a training certification. It is not the case that a certified trainer is always present in the store, nor is it

true that the store manager conducts all training, as demonstrated by this exchange between the Employer's attorney and Sandoval:

- Q : You said that, when you're not there, the training is shared by other people?
A: Yes.
Q : That's not true, is it? It
A: is true.
Q : Don't you have to have a certification to be a trainer at Starbuck's [sic]?
A: You
Q: Didn't you tell me earlier that none of the baristas, other than yourself, have a certification to train? A:
Yes.

(Objection by Petitioner's attorney, regarding argumentative and compound Question, and with regard to the Employer's attorney's failure to permit the witness to answer the question posed – followed by rephrasing of the question by the Employer's attorney)

- Q: Is there any other barista in [the Guadalupe facility] other than yourself, who is certified by Starbuck's [sic] to train another barista. A: No.
Q: So the only training that's authorized to be done in the coffee bar by Starbuck's [sic] is training by you, correct? A: Correct.
Q: So are you saying that you can violate Starbuck's [sic] requirements and let these other people do the training?
A: No. My district manager, Jenny [sic] understand [sic] that I haven't had time to – well, she hasn't had time to put anyone through the training coach manual yet. So she knows that there is training going on when I am not there. She understand [sic] that.

Because of the basic training requirement, there is little job-related interchange of employees between the coffee bar and the other sales clerk positions in the Guadalupe facility. However, employee Joleen Benevedz cross trained as a certified barista, a bagger, and a floral employee. According to Sandoval, who observed Benevedz's work in the floral department and her work schedule at the time, Benevedz worked three coffee bar shifts and two floral shifts each week. The record is silent with regard to the timing or duration of this arrangement. However, when it occurred, the store director at the time, John Perea, determined in which department Benevedz would work. It appears Benevedz was employed during 2004, and is not employed by the Employer currently. There is no other evidence of interchange of employees between the coffee bar and other areas of the Guadalupe facility. Rather, when a need arises, baristas are borrowed from another of Albertson's coffee bars. Sandoval testified that this has occurred once in the last three and one half years, while Antonson testified that this has occurred on as many as eight occasions since he became store director in February 2005.

The record is silent with regard to the source of the original Guadalupe store baristas. As for the current complement of Guadalupe store baristas, the record reflects that Rhonda Sanchez transferred from the St. Francis store coffee bar. The record is silent with regard to the source of the remaining current Guadalupe store baristas. However, the record does reflect that when the coffee bar at the Roswell store opened seven years ago, the initial baristas came from among the ranks of the existing grocery store staff. At that time, the Employer voluntarily recognized the Petitioner as the collective-bargaining representative of those coffee bar employees. Essentially, the Roswell coffee bar employees operate under the deli clerk provisions of the existing contract, and no additional language was included for the coffee bar employees. With regard to the Roswell store, the Employer moved to its present location in 1999, and remodeled it to include the addition of the Starbucks' coffee bar. By virtue of the recognition agreement, the Petitioner represents the six baristas and the coffee bar manager as part of the clerks unit in the Roswell store.

While the specialized training needed to work in a specific department may differ, the baristas and the employees in the clerks unit have similar working conditions. In this regard, the baristas are paid an hourly wage and the baristas and the represented clerks utilize the same time clocks and time cards. Between 60 percent and 80 percent of the employees in the clerks unit, depending upon the season, work 40 hours per week. Similarly, four of the five coffee bar staff work up to 36 to 40 hours per week. The coffee bar employees and the employees in the clerks unit have access to the same break areas and utilize the same restrooms. All Albertson's employees, including the coffee bar staff, participate in the Employer's "Greet Offer Think" customer service program. The baristas and the other clerks wear similar uniforms. With regard to the Employer's uniform requirements, Sandoval testified on cross examination in response to questions from the Petitioner's counsel:

Q: Do your uniforms basically match the other employees' in the store?

I know there's [sic] some differences there.

A: Yes

Q: Other employees in the store wear the same type of shirts that you wear with the Albertsons logo

A: Yes

Q: -- on the shoulder A:

Yes

Q: Okay. And what type of pants do you wear?

A: Black pants or khaki pants.

Q: Okay. And what type of pants to [sic] the other employees at the store wear?

A: Black or khaki.

Q. Okay, so you understand that to be the -- that the rule on pants that you follow is the same rule that every other employee in the store follows?

A: Yes

Under direct examination by the Employer's counsel, Antonson added further detail regarding the Employer's uniform policy:

Q: Now, with respect to the uniforms that are required at [the Guadalupe facility] how would you describe the differences between the uniforms worn by other employees in the store and those in the coffee bar?

A: Well, they wear the white polo, which is different from the burgundy polo we're currently wearing. They wear a green apron. They have a black hat, a black Starbucks hat. There is apron is green [sic] and the clerks' apron is blue.

Q: Now does the uniform in the Starbucks coffee bar ever change because of Starbucks' [sic] requirements?

A: They may have special promotions that go on from time-to-time and they may turn the like T-shirts [sic] that are imprinted with a new drink that they're trying to promote.

The Employer's employees, including the coffee bar employees, wear the same name tags. Additionally, the baristas must remove their Starbucks apron and hat when they leave the coffee bar. When a barista leaves the coffee bar, they are expected to assist the Employer's customer in the same manner as any other employee.

2. The Coffee Bar Manager

Sandoval worked about three years as a barista before being promoted to coffee bar manager in May 2006. Coffee bar managers must attend Starbucks' advanced certification training which is conducted off-site and includes modules on ordering, scheduling, customer service, and inventory. Upon completion of the advanced training, the coffee bar manager is qualified to manage any Starbucks. Sandoval works 40 hours per week and earns \$12.35 per hour. Sandoval spends 30 hours a week performing barista work. Her other responsibilities include ordering supplies, making the coffee bar schedule, ensuring that the baristas maintain Starbucks' service standards, scheduling meal breaks. However, in her absence, other baristas perform the same function. Similarly, in Sandoval's absence, baristas may call in sick to another barista and may call each other to fill absences. Sandoval testified that there is nothing about their name tags that distinguishes managers from employees. To the contrary, Antonson testified that the department managers have a "P touch" label on their name tags that distinguishes them as managers.

Sandoval testified that at the time she was promoted to the coffee bar manager position, she was not told anything about her authority in that position. Antonson testified to the contrary, that he informed Sandoval that she would be supervising the employees in the coffee bar. In this regard, it is undisputed that neither Sandoval nor any other department manager has ever been provided by the current store director with copies of the Employer's written discipline forms and that Sandoval has not received any instruction regarding the use of that form. Sandoval testified that she has not issued any discipline and that she has not been granted the authority to do so. However, Sandoval acknowledges that if an employee is late, she will inquire as to the reason, whether it will happen again, and advises them to be on time. Sandoval further testified that if the misconduct of the employee continued, she would consult Antonson. When asked about Sandoval's authority to issue discipline, Antonson conceded that other than making a general statement during her job interview to hold

employees accountable, he had not advised Sandoval that she was invested with such authority. No coffee bar manager has issued written discipline during Antonson's tenure at the Guadalupe facility. Antonson testified that both he and the coffee bar manager have the authority to participate in the issuance of disciplinary notices, but the record does not reflect that this authority has been imparted to Sandoval. It appears that previous coffee bar managers did in fact issue discipline, and perhaps had a role in one discharge. However, Antonson acknowledged that the company policy in this regard had changed, although the record is silent with regard to the nature, purpose, and timing of the change. It is undisputed that Sandoval does not have the authority to discharge employees. Antonson testified generally with regard to his experience with the Albertson's disciplinary system. He testified that initially a manager will address issues orally with an employee. The manager for example instructs the employee that he or she is not performing a task properly or that the employee needs to report for work on time. If that oral contact does not remedy the problem, the next step is a written discipline or suspension, both of which involve the store director. Antonson explained that in his experience with employee discipline procedures, the manager participates in the discipline meeting for the purpose of advising the employee what the employee has been doing wrong, because the manager has usually observed the problem first hand. There is, however, no evidence that Sandoval was advised of this practice or that this practice is applied at the Guadalupe facility.

Sandoval performs a role in ordering supplies from Starbucks and from its designated vendors as well as in establishing "par" quantities of supplies to be maintained in the coffee bar. Par quantities are based upon sales and may be modified at the discretion of the coffee bar manager. The products ordered include coffee, espresso, other drink ingredients, cups, hot cup sleeves, carrying trays, and straws. Janey Ashcroft, the Starbucks district manager, assists Sandoval in establishing proper par values and with the ordering process. She is also available to respond to questions. If Sandoval is running low on product between shipments, Ashcroft may facilitate the transfer of stock between Starbucks locations. Ashcroft also meets with Sandoval every two months. Problems with orders are addressed through Sandoval's inside sales representative, Chelsea Shaw, another Starbucks employee. The store director does not approve orders of supplies and does not have any knowledge of what is being ordered. Sandoval orders supplies by facsimile directly from Starbucks in Kent, Washington. The store director pays for the coffee bar supplies using general store revenues, in the same manner as he pays for the store's other grocery items.

In addition to ordering supplies, Sandoval is also responsible for establishing the coffee bar work schedule. In this regard, Antonson provides Sandoval with a labor budget which dictates the number of labor hours she may schedule the baristas each week. On occasion, Sandoval has scheduled her staff in such a manner as to exceed Antonson's labor budget and she has experienced no consequence for having done so. In establishing the schedule, Sandoval establishes the hours and duration of the shifts and designates which barista will work which days and shifts. In establishing the work schedule, Sandoval considers her own personal observations of each barista's reliability and general willingness to work. Sandoval testified that she crafts the schedule, but that she cannot post it until it has been reviewed by Antonson. Antonson has not asked Sandoval to change any of her scheduling decisions, but Sandoval testified that he could. A store-wide schedule is posted on

a single piece of paper at the time clocks and in each department after it is approved by Antonson. Each department has its own block on the schedule. Sandoval approves barista vacation requests without consulting Antonson and then arranges the employee schedule to honor the approved vacation requests. Sandoval also calls in substitute employees if a scheduled employee calls in sick. When a barista goes on vacation the scheduled hours of the remaining baristas may be expanded by Sandoval to provide adequate coffee bar coverage.

In addition to her scheduling duties, Antonson relies on Sandoval to assure that the established Starbucks' standards are followed. It does not appear that employees receive appraisals from Albertson's; however, Starbucks utilizes a secret shopper program through which employees receive feedback regarding their work. The Starbucks' secret shopper program involves an unidentified customer who presents him or herself at the counter and makes a drink purchase and then rates the experience with regard to drink temperature, weight, customer service, and cleanliness. A written report from the secret shopper is provided to the Starbucks' district manager, to Antonson, and ultimately to Sandoval. Antonson reviews the report, but expects Sandoval to follow up and correct any problems noted in the secret shopper report. Sandoval acknowledges that her role with regard to the secret shopper reports is to review complaints with the barista, to review with the barista the relevant portion of the Starbucks' training module, and to assure that the barista understands the relevant standards. If the barista still does not comply with the standards, it is Sandoval's job to deal with the situation, although the tools at her disposal for doing so are not specified in the record and it does not appear that she has taken any such actions. Sandoval does not lay off employees, interview employees, or have any role in their hire. Nor does she have any role in establishing wage rates or granting raises. In fact, the store director has no authority to grant raises. He makes such recommendations to a district manager who in turn refers the recommendation to a corporate human resources department. Sandoval does not resolve employee complaints or have keys to the store.

Sandoval attends weekly managers' meetings. The record is unclear with respect to the duties of the other managers, but with the exception of the grocery, bakery, coffee bar, and pharmacy managers, the other managers, including the lobby, service deli, produce, meat, floral, and general merchandise managers, are all apparently represented by labor organizations.

During the course of the hearing, the parties were solicited by the hearing officer, with regard to the appropriateness of a residual unit to include the other unrepresented individuals, described above. I note that at no time did the Petitioner claim interest in these unrepresented

D. The Unrepresented Employees

employees, and the record reflects that the parties agreed that for various reasons, including their status as statutory supervisors and lack of community interest, a residual unit comprised of the unrepresented individuals would not be appropriate.

E. Legal Analysis and Determination

1. The Self-Determination Issue of the Baristas

A self-determination election is the proper method by which a union may add unrepresented employees to the contractual unit. In this regard, it is necessary to determine the extent to which the employees to be included share a community of interest with unit employees, as well as whether the employees to be added constitute an identifiable distinct segment of the work force so as to constitute an appropriate voting group. *Warner-Lambert Company*, 298 NLRB 993, 995, citing *Capital Cities Broadcasting Corp.*, 194 NLRB 1063 (1972).

The Petitioner seeks an *Armour/Globe* election so that the Employer's coffee bar employees may vote as to whether they desire inclusion in the existing retail clerks bargaining unit represented by the Petitioner. The Employer has averred that the coffee bar employees constitute an appropriate stand-alone collective-bargaining unit. The Petitioner has taken the position that the coffee bar employees should be provided the opportunity to vote for inclusion in the overall clerks unit. These assertions necessarily evolve from the premise that the coffee bar employees are a distinct and homogeneous voting group. The record evidence offers support for the positions of the Employer and the Petitioner. Thus, the baristas, unlike any other unrepresented individuals, have as their primary function the preparation and serving of coffee and related products. In order to perform this function, they undergo separate and significant training. Moreover, this training is received on an on-going basis. Baristas derive from this training knowledge and skills that are not shared by other unrepresented employees. Baristas work in an area which is solely designated for them to perform their duties. They wear Starbucks insignia in addition to that on their Albertson's uniforms, thus identifying them closely to Starbucks and their beverage preparation duties. They are subject to correction based on reports by Starbucks' secret shoppers. Their promotion opportunities appear to be within their ranks, as opposed to the store in general. Accordingly, I find that the baristas, excluding the coffee bar manager, constitute a distinct and homogeneous voting group.

Having concluded that the coffee bar employees are a distinct voting group, I turn to the question whether the coffee bar employees share a community of interest with the existing clerks unit. I conclude that they do, based on the presence of the Board-recognized community-of-interest factors: (1) functional integration; (2) frequency of contact with other employees; (3) interchange with other employees; (4) degree of skill and common functions; (5) commonality of wages, hours and other working conditions; and (6) shared supervision. *Publix Supermarkets, Inc.*, 343 NLRB No. 109 slip op. at 3 (2004).

The element of functional integration strongly suggests a finding that the baristas should have the opportunity to be included in the existing retail clerks unit. The store director hires all of the personnel for the coffee bar. New hires in the coffee bar attend the same orientation training as other Guadalupe facility employees and they receive the Employer's cash register training which may constitute 20 percent of the entire barista training. The coffee bar employees utilize the same time clocks as the other employees and have access to the same break facilities and restrooms. Supplies for both the coffee bar and the grocery store are received by the same receiving employee, and the Employer provides maintenance for the refrigerator and the sinks in the coffee bar. Customers may purchase groceries at the

Starbucks cash register, or may purchase Starbucks merchandise at the grocery store's other cash registers. In short, the coffee bar is one of a number of departments in the store, all with a unique class of products which are offered for sale to customers, and which when taken together comprise the Employer's Guadalupe facility.

The elements of frequency of contact and interchange suggest the coffee bar employees' alignment with the interests of other employees in the clerks unit. While the functional integration described above provides substantial opportunity for contact between coffee bar employees and the other employees of the Employer, the record does not disclose the extent of such contact. The interchange between the coffee bar staff and the employees in the rest of the store was exemplified in a limited sense by employee Benevedz. This interchange is not inconsequential considering the stability of the staffing level in the coffee bar over the last three years. The Employer cites *J & L Plate, Inc.*, 310 NLRB 429 (1993), for the proposition that if there is minimal proof of the existence of these two elements then the significance of the remaining factors is diminished. While I do not concur with the Employer's position that there is minimal proof regarding these two elements, I note that *J & L Plate* is distinguishable. There, the union sought to represent the production and maintenance employees at a single facility. The employer argued and the Regional Director agreed that the only appropriate unit included production and maintenance employees at two facilities. The Board reversed the Regional Director's determination based in large part on the employer's failure to provide sufficient evidence to rebut the single facility presumption. That issue is simply not present in this case.

The degree of skill and common function elements would support a finding that coffee bar employees share a community of interest with the clerks unit. Although the record does not reflect a great deal about the functions of the other employee in the store, it is clear that all of the employees receive a common orientation class and that coffee bar employees are trained on the Employer's registers. Together, these facts suggest that there are common functions performed by the employees in the store. Furthermore, the 40-hour training that the coffee bar employees undergo appears to be for the purpose of training them to perform the specific tasks required to serve in their department. It is reasonable to assume that employment in any of the Employer's departments would require some on-the-job training in order to learn the specific skills, standards, and requirements of the job. The Employer is a collection of departments offering different products and the fact that some specialized, instore training is provided so that an employee may perform duties specific to his or her department, does not erase the commonality of their interests as employees engaged in a single integrated retail enterprise.

The commonality of wages element is inconclusive as to the question of community of interest. The record does not reflect the wage rates of the employees in the represented bargaining units or the wage rates of the other unrepresented employees. However, the record suggests that by virtue of their separate collective-bargaining agreements, the represented and unrepresented employees have different wage rates. With regard to the commonality of other working conditions, this element strongly supports a shared community of interest. All of the employees work in the same store. All of the employees use the same time clocks and their time cards are kept together. Coffee bar employees are subject to a very similar dress code as

employees in the rest of the store, including the same pants and polo shirts supplied by the Employer with an Albertson's shoulder logo. All of the employees wear the same name tag. The Employer's recent move to centralize its labor relations, including decision making with regard to discharge decisions, also tends to support my finding that the coffee bar employees have similar interests as the clerks unit. See *Ramada Inns, Inc., d/b/a Ramada Beverly Hills*, 278 NLRB 691, 691-2 (1986) (Board reversed Regional Director's decision ordering an election in separate units and ordered an election in the overall unit, based upon changed circumstances, including centralization of personnel and labor relations functions.)

The shared supervision element suggests the existence of a community of interest. All of the employees at the Guadalupe facility report, through department managers, to a common store director. The existing clerks unit is comprised of employees in various departments with various managers who report to the same store director. I also note that authority to take some personnel actions has been consolidated at a higher or at least a more centralized level outside the Guadalupe facility. Thus, the fact that employees report to different managers is of diminished significance.

I find further support for my position with regard to shared community of interest in the bargaining history at another of the Employer's New Mexico facilities. The coffee bar employees at the Roswell facility, under strikingly similar circumstances and by virtue of a voluntary agreement between the same parties, were included with employees in a thenexisting clerks unit. The Employer cites *A.L. Meshing Barge Lines*, 192 NLRB 1118 (1971), for the proposition that voluntary agreements are not determinative when there is a lack of a community of interest. In this case, however, I have found that there is a community of interest between the baristas and the clerks. I also note that the Board has not foreclosed the possibility that voluntarily reached agreements can establish bargaining history. In *PPG Industries, Inc.*, 180 NLRB 477, 481 (1969), the Board found that a bargaining unit established through a series of voluntary agreements, reached through the collective bargaining process, should not be disturbed because "voluntary agreements of this sort add up to a history of bargaining."

Finally, I note that in the very limited circumstances in which the Board has considered the status of employees at a separately branded retail operation contained inside another retail store. Important factors are the terms contained in the licensing arrangement and control of the labor relations of the secondary operation. In *United Mercantile, Incorporated, d/b/a Globe Discount City*, 171 NLRB 830 (1968), the Board carefully examined the licensing agreements between United Mercantile, a department store, and two licensees who operated its fine jewelry and shoe departments. United Mercantile made every effort to portray to the public the image of a single seamless operation. The Regional Director ordered an election among United Mercantile employees but excluded employees of the licensees, noting that although United Mercantile controlled the operational policies of its licensees, it did not control their labor relations policies. The Board reversed, finding that United Mercantile and its licensees were joint employers and ordering an election to include the employees of United Mercantile as well as the employees of its licenses in a single unit. The Board found a community of interest between the United Mercantile employees and the licensees' employees based upon the fact that they appear to operate as single uniform

enterprise, that they operate under the same roof and in the same general area, have common overall supervision, and make use of such common facilities as the restrooms, snack bar, restaurant, and parking lot.

Applying the *United Mercantile* standards to the instant matter is somewhat challenging due to the sparse record concerning the Starbucks/Albertson's licensing agreement. However, I find in the *United Mercantile* decision support for my conclusion that the Employer's coffee bar employees should be given the opportunity to vote for inclusion in the clerks unit. With the exception of the element of the appearance of an overall integrated operation, all of the elements relied upon by the Board in *United Mercantile* are present in this proceeding. Regarding the appearance of the integration element in *United Mercantile*, I note that the Starbucks is clearly established within the Employer in a manner that asserts its uniqueness, but I also note this separation is undermined by the fact that the coffee bar employees wear polo shirts containing the Albertson's logo even when working in the coffee bar. Moreover, unlike *United Mercantile*, the labor relations of the baristas is in the control of the licensor, Albertson's.

2. Supervisory Status of the Coffee Bar Manager

Section 2(11) of the Act defines the term "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

The possession of any one of these indicia is sufficient to deem the employee a supervisor. *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002); *Westwood Health Care Center*, 330 NLRB 935 (2000); *Pepsi-Cola Co.*, 327 NLRB 1062 (1998); *Allen Services Co.*, 314 NLRB 1060 (1994). Persons with the power "effectively to recommend" the actions described in Section 2(11) are supervisors within the statutory definition. *Sun Refining & Marketing Co.*, 301 NLRB 642, 649-650 (1991); *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972).

Although not dispositive of the issue of supervisory status, non-statutory indicia can be used to assist in the determination of supervisory status. See *Training School of Vineland*, 332 NLRB 1412 (2000); *Chrome Deposit Corps.*, 323 NLRB 961, 963 fn. 9 (1997). This "secondary indicia," includes higher pay, supervisor to non-supervisor ratios, or attendance at supervisor meetings, and may bolster evidence demonstrating that individuals otherwise exercise one of the powers listed in the statute. See *Marian Manor for the Aged and Infirm*, 333 NLRB 1084 (2001); cf. *Ken-Crest Services*, 335 NLRB 777 (2001).

The burden of proving supervisory status is on the party that alleges that it exists. *St. Francis Medical Center West*, 323 NLRB 1046 (1997). Thus, the burden of establishing the coffee bar manager's supervisory status lies with the Employer.

I conclude that the record establishes that the coffee bar manager is a supervisor within the meaning of Section 2(11) of the Act. In making this determination, I rely on several factors. First, the record demonstrates that the coffee bar manager exercises substantial discretion to assign and direct the work of the baristas. This discretion extends to her authority to schedule baristas' hours of work, shifts, and vacations. Not only does the coffee bar manager schedule baristas, she approves or rejects, without further review, their vacation requests. If she approves a vacation request, she completes the coffee bar work schedule by extending the hours of the other employees in her department to assure appropriate staffing. While the store director nominally reviews the schedules before they are posted, he has not made changes to the coffee bar schedule and apparently does not always look at it before it is posted.

Second, there is ample evidence to demonstrate that the coffee bar manager exercises substantial discretion to issue oral discipline designed to correct the work product of the baristas she supervises. As Antonson explained, such oral corrections are apparently part of a progression of discipline that can lead to further, more severe measures. Sandoval administers the corrective action required to bring baristas conduct into compliance with Starbucks' policies in response to secret shopper reports, and corrects baristas when they improperly prepare a beverage. Moreover, the record establishes that Antonson lacks specific knowledge of Starbucks' standards and coffee bar products and, therefore, relies heavily on the coffee bar manager's discretion to uphold the standards required by the licensing agreement, and to direct and operate her department. This discretion to operate her department extends to ordering product without the knowledge or approval of the store director and expending funds beyond the Employer's labor budget for her department without repercussion.

Finally, there exist numerous secondary indicia which support my conclusion that the coffee bar manager is a supervisor within the meaning of Section 2(11). Her compensation is \$1.60 per hour (approximately 12 percent) greater than the highest paid barista whom she supervises. *Mountaineer Park, Inc.*, 343 NLRB No. 135 slip op. at 4 (2004) (An hourly wage 50¢ to \$1.00 higher than other employees is secondary indicia of supervisory status.) I note that to some extent this difference in wages is likely suppressed by Santa Fe's minimum wage. Also, the coffee bar manager attends weekly management meetings. Lastly, if the coffee bar manager is found not to be a supervisor, store director Antonson would be responsible for the supervision of four employees plus the coffee bar manager in a department in which he has no expertise or training.

The Petitioner sites *Ralston Purina Company*, 260 NLRB 314 (1982) in support of its position that the coffee bar manager is not a statutory supervisor. I find *Purina* to be distinguishable. In *Purina*, the Board found that the particular assignment of work and preparation of work schedules involved in that case was insufficient to establish that a lead employee was a statutory supervisor. Although the specific statutory indicia relied upon in *Purina* are the same or similar to those relied upon by me in this matter, that is where the

similarities end. In *Purina*, the lead crafted the daily work schedule based upon a list of tasks which his supervisor provided to him in a log book maintained by the supervisor and based upon instruction he received in his daily meeting with his supervisor. The employees, in turn, selected the tasks they wished to perform from the list. This contrasts sharply with the responsible assignment and direction of work exhibited by Sandoval who establishes the entire schedule without input from her supervisor, can grant or deny vacation requests, and supplies employees with additional hours if needed to balance the schedule for a vacationing employee. Moreover, unlike the lead in *Purina*, the coffee bar manager utilizes substantial discretion in operating her department as is demonstrated by the fact that her store director knows little of the coffee bar's operations and her Starbucks' district manager visits only occasionally.

3. Residual Unit Issue

I have determined that a residual unit containing all of the unrepresented employees at the Guadalupe facility would not constitute an appropriate unit. In this regard, although the record is silent as to the duties of most of the unrepresented individuals, other than the coffee bar employees, I note that when the issue was raised during the hearing, both the Employer and the Petitioner took the position that such a unit, for various reasons, was inappropriate; the Petitioner arguing that the other persons in that group were either supervisors or lacked a community of interest with one another. The Employer argues that the only appropriate unit in which the coffee bar employees could participate is their own stand alone unit.

In accepting the Petitioner's and the Employer's general positions, I note that the grocery manager and the bakery manager are the only other managers not members of, or represented by, the Petitioner. Also, the recognition language contained in the Petitioner's clerks unit collective bargaining agreement explicitly excludes from the unit, two assistant "store directors." Although the record does not reflect their identity, it appears they are the grocery and bakery managers. I also note that the bookkeeper appears to perform office clerical type functions. I note that if none of the residual persons who possess supervisory titles are statutory supervisors, then the Employer's 130 Guadalupe facility employees would have just one supervisor, the store director. In summary, I agree that the other unrepresented individuals are either supervisors, managerial employees, individuals who work in the pharmacy, or individuals who work in an office clerical position. Rather than a unit that includes every current unrepresented employee, the Board finds an appropriate residual unit one that consists of "all unrepresented employees of the type covered by the petition." *Carl Buddig and Company*, 328 NLRB 929, 930 (1999), *G.L. Millikin Plastering*, 340 NLRB 1169, 170 (2003). The potential residual unit in this proceeding would not include most of the remaining unrepresented individuals. Finally, I note that the Employer's brief asserts that the Petitioner had disclaimed interest in representing the currently unrepresented employees. However, at the hearing, both the Petitioner and the Employer took the position that a residual unit containing all of the unrepresented individuals would not be appropriate.

F. Conclusion

Accordingly, for the reasons set forth above, I shall order an election to be held for the purpose of determining whether the coffee bar baristas, excluding the coffee bar manager,

desire to be included in the clerks unit currently represented by the Petitioner, whether they wish to be represented by the Petitioner in a free-standing unit, or whether they desire to remain unrepresented.

In sum, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a voting group appropriate for collective bargaining within the meaning of Section 9(b) of the Act. Accordingly, I shall direct a separate election in the following voting group:

VOTING GROUP

Included: All full-time and regular part-time coffee bar employees employed by the Employer at its 600 North Guadalupe Street, Santa Fe, New Mexico facility.

Excluding: All coffee bar managers, bakery managers, pharmacy managers, and grocery managers, pharmacy employees, scan coordinators, office clerical employees, all employees currently represented by labor organizations, and all guards and supervisors, as defined in the Act.

The employees in the voting group will be asked two questions on their ballots:

1. Do you desire to be represented for purposes for collective bargaining by United Food and Commercial Workers' Union Local No. 1564?
2. Do you desire to be included with the Employer's other employees in the clerks unit already represented by the United Food and Commercial Workers Union Local No. 1564, at the Employer's 600 North Guadalupe Street, Santa Fe, New Mexico facility, for the purpose of collective bargaining?

If a majority of the voters in the voting group who cast valid ballots vote yes to the first question, indicating a desire to be represented by the Petitioner, and majority of the valid votes are cast in the affirmative on the second question, the following employees would constitute a unit appropriate for collective bargaining:

Included: All checking, stocking, receiving, produce, bakery sales, courtesy clerks and coffee bar employees employed by the Employer at its 600 North Guadalupe Street, Santa Fe, New Mexico facility.

Excluded: Meat department employees, bakery production employees, janitors, office clerical employees, a scan coordinator, the coffee bar manager, confidential employees, guards, watchmen, professional employees, store director, two assistant store directors, general

merchandise manager and other supervisors, as defined in the Act, and all other employees.

If a majority of the voters in the voting group who cast valid ballots vote yes to the first question, and a majority of the valid votes cast are in the negative as to the second question, the following employees would constitute a unit appropriate for collective bargaining:

Including: All full-time and regular part-time coffee bar employees employed by the Employer at its 600 North Guadalupe Street, Santa Fe, New Mexico facility.

Excluding: All coffee bar managers, bakery managers, pharmacy managers, and grocery managers; pharmacy employees, scan coordinators, office clerical employees, all other employees, and all guards and supervisors as defined in the Act.

There are approximately four employees in the voting group in which the election is being directed.

DIRECTION OF ELECTION

I direct that an election by secret ballot be conducted in the above voting group at a time and place that will be set forth in the notice of election that will issue soon, subject to the Board's Rules and Regulations. The employees who are eligible to vote are those in the voting group who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Also eligible are those in military services of the United States Government, but only if they appear in person at the polls. Employees in the voting group are ineligible to vote if they have quit or been discharged for cause since the designated payroll period; if they engaged in a strike and have been discharged for cause since the strike began and have not been rehired or reinstated before the election date; and, if they have engaged in an economic strike which began more than 12 months before the election date and who have been permanently replaced. All eligible employees shall vote whether or not they desire to be represented for collective-bargaining purposes by:

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL UNION NO. 1564

and also whether or not they wish to be included with the Employer's other employees in the clerks unit already represented by the United Food and Commercial Workers Union Local

No. 1564, at the Employer's 600 North Guadalupe Street, Santa Fe, New Mexico facility, for the purpose of collective bargaining.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues before they vote, all parties in the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, I am directing that within seven (7) days of the date of this Decision, the Employer file with the undersigned, two (2) copies of an election eligibility list containing the full names and addresses of all eligible voters. I shall make this list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, I must receive the list at the NLRB Region 28 Resident Office, 505 Marquette Avenue, NW, Suite 1820, Albuquerque, New Mexico, 87102, on or before August 4, 2006. No extension of time to file this list shall be granted except in extraordinary circumstances. The list may be submitted by facsimile or e-mail transmission, in which case only one copy need be submitted. The filing of a request for review shall not excuse the requirements to furnish this list.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. The Board in Washington must receive this request by August 11, 2006. A copy of the request for review should also be served on me. The request may not be filed by facsimile.

Dated at Phoenix, Arizona, this 28th day of July 2006.

/s/Cornele A. Overstreet

Cornele A. Overstreet, Regional Director
National Labor Relations Board, Region 28